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### Recent Developments in Bankruptcy Law

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# RECENT DEVELOPMENTS IN BANKRUPTCY LAW\*

by Nancy B. Rapoport\*\*

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During the 2002 to 2003 term, the Fifth Circuit clarified a few aspects of the Bankruptcy Code and focused its efforts on issues of jurisdiction. What follows is a sampling of Fifth Circuit decisions during the term.

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## I. "PURE" ISSUES OF BANKRUPTCY LAW

A. *Fraudulent Conveyances*

In *Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.)*, the Fifth Circuit had to decide whether the trustee could recover as fraudulent conveyances \$2,472,500 paid by the debtors to the Jimmy Swaggart Ministries (JSM).<sup>1</sup> JSM owned some land that the debtors wanted to purchase, and the debtors purchased an option to buy a tract of JSM's land.<sup>2</sup> Recile, who controlled the debtors, paid \$2,472,500 over two years toward an eventual purchase price of \$11,250,000.<sup>3</sup> Recile offered promissory notes to several short-term investors to finance his project (on a "double-your-money-back" basis), and he often paid JSM on a daily or weekly basis in cash, often with countersigned third-party checks.<sup>4</sup> Not surprisingly, Recile came to the attention of the Securities and Exchange Commission; after a fifteen-month period, Hayes was appointed the receiver of Recile's companies.<sup>5</sup> Hayes filed voluntary Chapter 11 petitions on behalf of Recile's companies.<sup>6</sup>

The fraudulent conveyance action followed, and the Bankruptcy Court found that JSM was not a party to Recile's fraudulent schemes.<sup>7</sup> The district court reversed and remanded the case.<sup>8</sup> On remand, the Bankruptcy Court granted Hayes's motion for judgment in his favor but denied prejudgment interest.<sup>9</sup> On appeal (again), the district court reversed the denial of prejudgment interest.<sup>10</sup>

The Fifth Circuit found that JSM satisfied the terms of 11 U.S.C. § 548(c) ("good faith defense")<sup>11</sup> and therefore did not reach the question of whether actual or constructive fraudulent conveyances took place.<sup>12</sup> In discussing the good-faith defense, the Fifth Circuit focused on the transferee's (JSM's) state of mind.<sup>13</sup> When the transfers were made, JSM did not know that the debtors were insolvent, although it had been aware of the SEC investigation.<sup>14</sup> In fact, JSM undertook its own investigation of Recile's

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1. 310 F.3d 796 (5th Cir. Oct. 2002).

2. *Id.* at 798.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 799.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. 11 U.S.C. § 548(c) (2000) (providing that a transferee who took "for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation").

12. *In re Hannover Corp.*, 310 F.3d at 799.

13. *Id.* at 800.

14. *Id.*

activities after reading the reports of the SEC investigation.<sup>15</sup> The Fifth Circuit found no error in the Bankruptcy Court's findings, preferring the usual clearly erroneous review to a new formulation of the section 548(c) good-faith defense.<sup>16</sup> The Fifth Circuit also rejected Hayes's "value" argument, which had proposed that, because Recile could not have afforded to exercise the option to purchase, the option had no value.<sup>17</sup> As Judge Jones explained, "Read in combination, §§ 548(a) and (c) are perfectly complementary. The first section affords creditors a remedy for the debtor's fraudulence or, as the case might be, mere improvidence; the second protects the transferee from his unfortunate selection of business partners."<sup>18</sup>

The Fifth Circuit thus reversed the district court's reversal of the Bankruptcy Court's judgment.<sup>19</sup> This case wins the "justice delayed is, well, justice delayed" award: the Bankruptcy Court's ruling was entered in 1985 and the district court's reversal was entered in 1999.<sup>20</sup>

### *B. Ordinary Course of Business*

In *Gulf City Seafoods, Inc. v. Ludwig Shrimp Co. (In re Gulf City Seafoods, Inc.)*, the Fifth Circuit clarified the definition of "ordinary course of business."<sup>21</sup> For a defense that a payment was made in the ordinary course of business,

the creditor must show that as between it and the debtor, the debt was both [1] incurred and [2] paid in the ordinary course of their business dealings *and* [3] that the transfer of the debtor's funds to the creditor was made in an arrangement that conforms with ordinary business terms—a determination that turns the focus away from the parties to the practices followed in the industry.<sup>22</sup>

To be successful, then, the ordinary course of business defense must prove all three parts of the defense.<sup>23</sup> The Fifth Circuit acknowledged that its test would turn on the definition of the relevant industry whose practice was being examined.<sup>24</sup>

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15. *Id.*

16. *Id.* at 800-01.

17. *Id.* at 801.

18. *Id.* at 802. The Fifth Circuit also found that JSM satisfied the "regular course of business" defense available under Louisiana law. *Id.* at 804-05.

19. *Id.* at 801.

20. *Id.* at 798.

21. 296 F.3d 363 (5th Cir. July 2002).

22. *Id.* at 367.

23. *Id.*

24. *Id.* at 367-68.

### C. Denial of Discharge

You have to love an opinion that leads with “[t]hough the marriage of Robertson and Dennis lasted for barely six years, the litigious aftermath has lasted for over a decade.”<sup>25</sup> Although the issue in the case itself (i.e., whether the transfer of savings bonds to a son was evidence of actual intent to defraud for the purpose of 11 U.S.C. § 727(a)(2)(A))<sup>26</sup> is not that significant in terms of bankruptcy law, the footnotes are classic and well-written. The following is an example from the last footnote of the case: “Robertson devotes so much time to the molehill, *i.e.*, how he preserved the ruling for appeal, that he completely neglects the mountain, *i.e.*, why the ruling was incorrect.”<sup>27</sup>

### D. Property of the Estate

*Unsecured Creditors Disbursement Committee v. Antill Pipeline Construction Co. (In re Equinox Oil Co.)* addressed the question of whether the proceeds from the debtor’s well-control insurance policy were property of the estate.<sup>28</sup> The Fifth Circuit found that the proceeds were property of the estate because the policy named the debtor as the assured, and the debtor would therefore receive payment for any losses that the policy covered.<sup>29</sup>

### E. Section 546(e) and Settlement Payments on Forward Contracts

11 U.S.C. § 546(e) exempts forward contract merchants from avoidance actions.<sup>30</sup> In *Williams v. Morgan Stanley Capital Group Inc. (In re Olympic Natural Gas Co.)*, the Fifth Circuit had to decide if Morgan Stanley was a “forward contract merchant” seeking to avoid a “settlement payment.”<sup>31</sup> To answer this question, the court first determined if Morgan Stanley was a forward contract merchant.<sup>32</sup> According to the Fifth Circuit, “[t]he commodities market is divided into only two categories: (1) on-exchange

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25. 330 F.3d 696, 700 (5th Cir. May 2003).

26. *Id.* at 700-01.

27. *Id.* at 706 n.13.

28. 300 F.3d 614 (5th Cir. Aug. 2002).

29. *Id.* at 619.

30. 11 U.S.C. § 546(e) (2000). The subsection provides, Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

*Id.*

31. 294 F.3d 737 (5th Cir. June 2002).

32. *Id.* at 740.

futures transactions; and (2) off-exchange forward contracts . . . [,which] are 'contracts for the future purchase or sale of commodities that are not subject to the rules of a contract market or board of trade.'<sup>33</sup> Using this definition, the Fifth Circuit found that Morgan Stanley was a forward contract merchant; then, interpreting the phrase "settlement payments" as including "payments made in settlement of forward contract transactions," the court concluded that Morgan Stanley could use the exemption of section 546(e).<sup>34</sup>

## II. JURISDICTION

### A. *Farmers and Involuntary Bankruptcy Petitions*

*McCloy v. Silverthorne (In re McCloy)* involved a farmer, Willard McCloy, who was placed into an involuntary Chapter 7 bankruptcy by a creditor.<sup>35</sup> At some point in that bankruptcy, the trustee negotiated a settlement involving some of McCloy's community property.<sup>36</sup> McCloy converted the case into Chapter 11 and then back to Chapter 7.<sup>37</sup> (Beatrice McCloy had filed for Chapter 12 protection six years before her husband had been placed into involuntary bankruptcy.)<sup>38</sup> The McCloy's argued that the community property was not property of the estate and that the Bankruptcy Court did not have jurisdiction over McCloy because he was a farmer and farmers cannot be forced into involuntary bankruptcy.<sup>39</sup> The Fifth Circuit made short shrift of all of the McCloy's arguments. The court clarified that McCloy's farmer status did not deprive the Bankruptcy Court of jurisdiction but "instead [was] an affirmative defense that may be waived."<sup>40</sup>

### B. *Ability to Arbitrate Claims When Plan Provides for Settlement or Trial of Claims*

Under *United States Brass Corp. v. Travelers Insurance Group (In re United States Brass Corp.)*, if a plan of reorganization provides that certain claims will be resolved by settlement or trial in an appropriate court, then the parties cannot refer those claims to arbitration instead.<sup>41</sup> The Fifth Circuit noted that, even though the plan had been substantially consummated, it had

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33. *Id.* at 741 (quoting 5 COLLIER ON BANKRUPTCY ¶ 556.02[2], at 556-5 (Lawrence P. King ed. 2002)).

34. *Id.* at 742.

35. 296 F.3d 370 (5th Cir. July 2002).

36. *Id.* at 371.

37. *Id.* at 372.

38. *Id.* at 371.

39. *Id.*

40. *Id.* at 375.

41. *See* 301 F.3d 296, 308-09 (5th Cir. July 2002).

not been *completely* consummated and sufficient jurisdiction existed, postconsummation, for the Bankruptcy Court to hear the arbitration issue.<sup>42</sup>

*C. When Worlds Collide: What Happens When the Federal Arbitration Act and the Bankruptcy Code Lead to Conflicting Results?*

*Gandy v. Gandy (In re Gandy)* involved a clash between the Federal Arbitration Act and the Bankruptcy Code.<sup>43</sup> Before the debtor had filed her bankruptcy petition, she had filed a state court action to determine whether her soon-to-be ex-husband had manipulated the ownership interests of their family business.<sup>44</sup> The state court stayed the suit pending arbitration (which was the dispute resolution forum specified by the business's partnership documents).<sup>45</sup> When the debtor then filed for bankruptcy protection, the state court action was removed to the Bankruptcy Court as an adversary proceeding, and the debtor consolidated that adversary proceeding with yet another one that she had initiated, culminating in a third amended complaint.<sup>46</sup> The defendants again moved to compel arbitration, and the Bankruptcy Court denied the motion, finding that the debtor's complaint was intended to avoid certain fraudulent transfers.<sup>47</sup> The district court affirmed on the grounds that the debtor's complaint was a core proceeding.<sup>48</sup>

The issue was whether the debtor's original agreement to be bound by arbitration outside bankruptcy (normally an irrevocable agreement) prevented the debtor from pursuing her bankruptcy remedies.<sup>49</sup> Observing that "[a] bankruptcy court does possess discretion . . . to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicts with the purpose of the Code,"<sup>50</sup> the Fifth Circuit found that the predominant causes of action (the avoidance actions) were those that solely derived from the Bankruptcy Code.<sup>51</sup> The Fifth Circuit then narrowed its ruling to emphasize that the Bankruptcy Court could exercise its discretion to refuse to enforce the arbitration clause "*only* when enforcement would conflict with the purpose or provisions of the Code."<sup>52</sup>

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42. *Id.* at 305-06.

43. 299 F.3d 489 (5th Cir. July 2002).

44. *Id.* at 491-92.

45. *Id.* at 493.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 494.

50. *Id.* at 495.

51. *Id.* at 495-96.

52. *Id.* at 498 (emphasis added).

*D. How Far Can a Nondebtor Go to Save His Own Hide?*

Edward Pena, the president and owner of the debtor in *IRS v. Prescription Home Health Care, Inc. (In re Prescription Home Health Care, Inc.)* tried hard to get himself off the hook for collecting the employees' share of income and payroll taxes but failing to pay the funds over to the government.<sup>53</sup> The issue was whether a bankruptcy court could confirm a plan that contemplated an injunction prohibiting the IRS from assessing a "trust fund" penalty against the president and owner.<sup>54</sup> Pena, the person who was charged with the responsibility of collecting and remitting those taxes, wanted to have the plan apply certain payments to the IRS's priority claim first because that would have reduced his personal liability to the IRS.<sup>55</sup> But because Pena was not a debtor in the bankruptcy, the Fifth Circuit held that the Bankruptcy Court did not have jurisdiction to enjoin the IRS from pursuing penalties against him, notwithstanding Pena's hopes of pinning such an injunction on the ever-optimistic argument that 11 U.S.C. § 105(a) would have permitted such an injunction.<sup>56</sup> When it comes to section 105(a), hope springs eternal.

*E. Miscellaneous Jurisdiction Issues*

1. *Texas Comptroller of Public Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.)*: This case is a procedural nightmare, and the lesson of the case is that procedural nightmares often prevent meaty issues from being discussed (in this case, the appropriate interest rate for certain payments under a plan; after the parties appealed a Bankruptcy Court order, the Bankruptcy Court had no further jurisdiction on that particular matter being appealed and thus could not enter a supplemental order).<sup>57</sup> Lesson: one order, and one appeal, at a time.

2. *Bissonnet Investments LLC v. Quinlan (In re Bissonnet Investments LLC)*: After a defendant removed the debtor's state court lawsuit to federal court pursuant to 28 U.S.C. § 1452, the debtor tried to challenge the federal court's subject matter jurisdiction.<sup>58</sup> The district court determined that it had subject matter jurisdiction, and the Fifth Circuit affirmed.<sup>59</sup> 11 U.S.C. § 1447(d) "precludes all review of decisions to remand when based on a

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53. 316 F.3d 542 (5th Cir. Dec. 2002).

54. *Id.* at 544. The IRS may assess a penalty to the "responsible person" of an employer for failure to remit to the IRS those funds withheld from employees' paychecks for income and payroll taxes. *Id.* The withheld funds are considered to be "trust fund" payments. *See id.*

55. *See id.* at 545-46.

56. *See id.* at 548-49.

57. 303 F.3d 571 (5th Cir. Aug. 2002).

58. 320 F.3d 520, 521 (5th Cir. Feb. 2003).

59. *Id.* at 526.



perceived lack of subject matter jurisdiction, even if the district court erroneously believes it lacks jurisdiction."<sup>60</sup> But in this case, the district court "decided *not* to remand for an alleged lack of jurisdiction, [and thus] § 1447(d) [did] not preclude [the Fifth Circuit's] appellate jurisdiction."<sup>61</sup> This case is heaven for jurisdiction mavens.

### III. BANKRUPTCY CASES INVOLVING KEY ISSUES OF NONBANKRUPTCY LAW

#### A. Contract Construction in the Area of Environmental Law

In *Refinery Holding Co. v. TRMI Holdings, Inc. (In re El Paso Refinery, LP)*, the Fifth Circuit interpreted an agreement involving environmental clean-up liability after a foreclosure.<sup>62</sup> Texaco had built a refinery in 1929 and, in the mid-1980s, had spun it off into a wholly owned subsidiary, Texaco Refining & Marketing, Inc. (TRMI).<sup>63</sup> TRMI agreed to assume all clean-up responsibility for the refinery.<sup>64</sup> When TRMI sold the refinery to the debtor, TRMI and the debtor allocated responsibility for any clean-up, and they covenanted not to let any subsequent owner seek contribution (or actual clean-up) from TRMI.<sup>65</sup> When the debtor later filed for Chapter 11 protection, the refinery went into "warm shut-down mode," and the creditor banks entered into an agreement (the "Term Sheet") with the bankruptcy examiner.<sup>66</sup> The Term Sheet permitted the banks to foreclose on the refinery and shifted all clean-up responsibility to the acquiring party (in this case, Refinery Holding Co. (RHC)).<sup>67</sup>

As a result of the foreclosure and the Term Sheet, did RHC assume only the postforeclosure clean-up liability or all of the clean-up liability?<sup>68</sup> The Bankruptcy Court held that RHC assumed liability for all undiscovered contamination, and it implicitly indemnified the estate against all environmental liability, holding that TRMI and Texaco could not sue as third-party beneficiaries of the Term Sheet.<sup>69</sup> The district court reversed part of the Bankruptcy Court's ruling, holding instead that RHC could go after TRMI and Texaco for contribution, and the district court affirmed that TRMI and Texaco

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60. *Id.* at 524.

61. *Id.* at 525.

62. 302 F.3d 343 (5th Cir. Aug. 2002).

63. *Id.* at 346. Texaco Refining & Marketing, Inc. subsequently changed its name to TRMI Holdings, Inc. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 346-47.

67. *Id.* at 347.

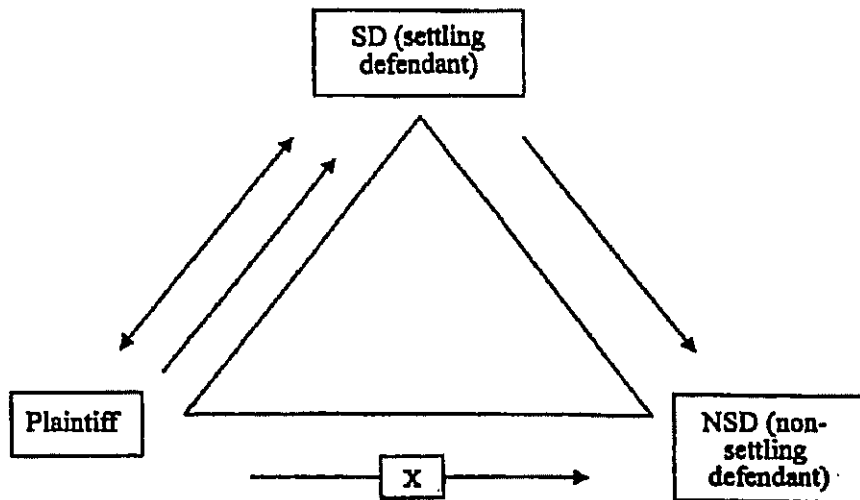
68. *Id.* at 347-48.

69. *Id.*

were not third-party beneficiaries.<sup>70</sup> On appeal, Texaco tried a shotgun approach to avoid clean-up liability.

First, Texaco claimed that the Bankruptcy Court did not have jurisdiction over it because Texaco was not one of the debtor's creditors but was an unrelated third party, and thus, Texaco's claim against RHC was not "related to" the bankruptcy.<sup>71</sup> The Fifth Circuit disagreed with Texaco's position, observing that the claims were related to the estate because Texaco formerly owned the debtor's refinery and was thus still subject to possible clean-up liability.<sup>72</sup>

The Fifth Circuit then considered whether RHC's claim of contribution against TRMI and Texaco was barred by the "circuitry of action" defense.<sup>73</sup> For the circuitry of action defense to apply, the nonsettling defendant must show (1) that it was entitled to indemnification from the settling defendant and (2) that the plaintiff was obligated to hold the settling defendant harmless.<sup>74</sup> In other words, if SD (the settling defendant) has an obligation to indemnify NSD (the nonsettling defendant) and P (the plaintiff) is obligated to indemnify SD for future liability, then SD's duty to indemnify NSD should end because P would have to pay SD's indemnification of NSD out of P's own pocket. The following is an illustration of how the defense would work:



70. *Id.* at 348.

71. *Id.*

72. *Id.* at 349.

73. *Id.* at 349-52. "Circuitry of action" is a defense "when, as the result of indemnification obligations or settlement agreements between the parties, a plaintiff would end up indemnifying another party for its own original claim." *Id.* at 349-50.

74. *Id.* at 350.

In this case, the district court decided that the defense did not apply, and the Fifth Circuit agreed.<sup>75</sup> RHC's covenant not to sue was not enough of an explicit agreement to indemnify to trigger the circuitry of action defense,<sup>76</sup> especially when the settling parties apparently "executed the Settlement Agreement for the express purpose of creating a circular pattern of indemnification that could bar . . . claims for contribution."<sup>77</sup>

The real issue in this case was whether, at the time that the parties executed the Term Sheet, RHC assumed the responsibility for *all* unknown environmental problems or only those that were discovered after foreclosure.<sup>78</sup> The Bankruptcy Court found that RHC had assumed all of the liabilities, and the district court found that RHC had assumed only the postforeclosure liabilities.<sup>79</sup> The Fifth Circuit agreed with the district court on the grounds that the Term Sheet's language used such phrases as "from and after" and "upon foreclosure" and that the Term Sheet had identified the known environmental liabilities at the time of the foreclosure.<sup>80</sup> Moreover, an earlier draft of the Term Sheet had RHC assuming all liability without *any* qualifying language; RHC had rejected that draft.<sup>81</sup>

The Fifth Circuit also concluded that TRMI was not a third-party beneficiary to the Term Sheet because the Term Sheet only allocated responsibility for clean-up as between RHC and the estate.<sup>82</sup> The Term Sheet had not referred to TRMI, Texaco, or any of the other prior owners; thus, no clear intent to benefit TRMI existed.<sup>83</sup> TRMI's next argument was that the deed that El Paso signed—in which El Paso agreed never to pursue TRMI for clean-up responsibility—was a covenant that ran with the land.<sup>84</sup> The Fifth Circuit determined that El Paso's agreement did not "touch and concern" the land; rather, it was a personal covenant.<sup>85</sup> Even TRMI's last-ditch argument—that the covenant in the deed was an equitable servitude—failed because the covenant did not touch and concern the land.<sup>86</sup> Lesson: every part of the first-year contracts class is important, especially the part about rules of construction.

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75. *Id.*

76. *Id.*

77. *Id.* at 352.

78. *See id.*

79. *Id.*

80. *Id.* at 352-53.

81. *Id.* at 353.

82. *Id.* at 354.

83. *Id.*

84. *Id.* at 355.

85. *Id.* at 356.

86. *Id.* at 357-58.

### B. Rural Homesteads in Texas

In *Rush Truck Centers of Texas v. Bouchie* (*In re Bouchie*), the Fifth Circuit held that section 41.002(c) of the Texas Property Code, and not *United States v. Blakeman*,<sup>87</sup> governed whether a homestead was urban or rural<sup>88</sup> and “all that is required for rural homestead purposes is that the property be used as a home.”<sup>89</sup>

### C. Louisiana Law on Automatic Termination Provisions

According to *Lifemark Hospitals, Inc. v. Liljeberg Enterprises, Inc.* (*In re Liljeberg Enterprises, Inc.*), Louisiana law is clear: if a party to a contract wants to argue that the contract has automatically terminated postpetition and is therefore no longer executory, the party that wants to argue for termination had better “seek[] judicial dissolution of the contract or at least provide[] notice of the intent to exercise the right to terminate the contract for default, even if the contract explicitly provides for automatic termination.”<sup>90</sup>

### D. Best Example of the Maxim, “If You are Not Part of the Solution, You are Part of the Problem”

In *Williams v. International Brotherhood of Electrical Workers* (*In re Williams*), the Fifth Circuit held that the debtor “forfeit[ed] its right to challenge the accuracy of an audit conducted pursuant to a court-enforced arbitration award if the [debtor] refuse[d] to cooperate in the auditor’s investigation.”<sup>91</sup> By refusing to cooperate with the auditors, the debtors could not complain about the results of the audit.<sup>92</sup>

### E. Best Illustration of the Principle That Persistence Is Not Always “Plus”

Sometimes, a battle of wills exists in the hierarchy of the federal court system. In *In re Daimlerchrysler Corp.*, various auto makers sought writs of mandamus from the Fifth Circuit to direct the district court to recall all of the remand orders that it had issued (contrary to orders from a sister district court); the auto makers also requested that the Fifth Circuit reassign all of the

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87. *United States v. Blakeman*, 997 F.2d 1084 (5th Cir. 1992).

88. *In re Bouchie*, 324 F.3d 780, 784 (5th Cir. Mar. 2003).

89. *Id.* at 786.

90. 304 F.3d 410, 438 (5th Cir. Aug. 2002).

91. 298 F.3d 458, 462 (5th Cir. July 2002).

92. *Id.* at 463.

friction products claims to a different district court judge.<sup>93</sup> The Fifth Circuit granted the mandamus petitions and reassigned all of the friction products claims.<sup>94</sup> The majority found that reassignment was necessary “because of the hostility demonstrated toward the defendants in the district court’s response to the petitions for writ of mandamus.”<sup>95</sup> The dissent refused to join in the reassignment portion of the opinion.<sup>96</sup>

*F. Winner of the “Attorneys Should Rest Easy” Award*

In *Daniels v. Barron (In re Barron)*, the Fifth Circuit had to decide the question of whether, after the Bankruptcy Court approved a contingent fee arrangement for pursuing a disputed claim for the estate, the Bankruptcy Court could later reduce the amount of the fee.<sup>97</sup> The Bankruptcy Court was uncomfortable with the thirty-three percent contingency fee because the dispute was, ultimately, easily resolved.<sup>98</sup> The first time that the attorney appealed the fee reduction to the district court, the district court affirmed and the Fifth Circuit reversed and remanded.<sup>99</sup> On remand, the Bankruptcy Court reconsidered but came to the same result; the district court again affirmed, with the Fifth Circuit again reversing and remanding.<sup>100</sup> The Fifth Circuit made it clear that the *only* reason to reduce previously approved attorneys’ fees on the basis of unanticipated intervening circumstances must be because the “intervening circumstances must have been *incapable* of anticipation, not merely unanticipated.”<sup>101</sup> In this case, at the time that the Bankruptcy Court approved the contingency fee arrangement, the court could have anticipated that the dispute could have easily been resolved; therefore, the court could not renege on the award.<sup>102</sup> The fun-to-read part of this case is Judge Jones’s concurrence, which begins, “A pox on all their houses!”<sup>103</sup> No one could have said it better.

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93. 294 F.3d 697, 698 (5th Cir. June 2002).

94. *Id.*

95. *Id.* at 701. The Fifth Circuit quoted some of the district court’s language in its response to the mandamus petitions. See *id.* at 701 n.1. The district court’s response has some interesting turns of phrase, including “torquing the law beyond recognition.” *Id.*

96. *Id.* at 702.

97. 325 F.3d 690 (5th Cir. Apr. 2003).

98. *Id.* at 691.

99. *Id.*

100. *Id.*

101. *Id.* at 693.

102. *Id.* at 693-94.

103. *Id.* at 694 (Jones, J., concurring). According to Judge Jones, the debtor’s bankruptcy was a clear case of a bad faith filing. *Id.* at 695 (Jones, J., concurring).